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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

Plaintiffs,	
vs.	
UNITED BEHAVIORAL HEALTH,	a
California Corporation, UNITEDHEALTHCARE INSURANG	CE
COMPANY, a Connecticut Corporation MULTIPLAN, INC., a New York Corporation	-
Defendants.	•

LD, DB, BW, RH and CJ on behalf of

themselves and all others similarly situated,

Case No. 4:20-cv-02254-YGR-JCS

Hon. Yvonne Gonzalez Rogers

PLAINTIFFS IDENTIFICATION OF DOCUMENTS FOR POTENTIAL IN CAMERA REVIEW

Privilege ID

PRIV-000003,

PRIV-000007, PRIV-000010,

PRIV-000012,

PRIV-000020, PRIV-000026

PRIV-000023

1

Plaintiffs Identification of Documents for Potential in Camera Review

Pursuant to this Court's Order of October 3, 2022 (dkt. 201) and joint stipulation of the parties (dkt. 230), MultiPlan has submitted to Plaintiffs' a revised Privilege Log (the most recent and final revised Privilege Log received by Plaintiffs on October 28, 2022, is attached hereto). The Parties have also met and conferred on October 24 & 26, 2022; however, Plaintiffs find that many assertions of privilege and the accompanying descriptions fail to comply with the clear directives from the Court set out in its prior Orders of August 5, 2022 (dkt. 162) and October 3, 2022 (dkt. 201). Therefore, as directed by the Court, Plaintiffs have identified the fifty withheld documents for potential *in camera* review by the Court along with a brief statement as to the basis for the documents' selection.

Brief Explanation of Selection Privilege(s) asserted: attorney client & work product

Privilege(s) asserted: attorney client & work product

- 11				
1		Explanation of selection: The description is insufficient as to both		
2		attorney client and work product assertions of privilege. The description identifies the document as "Spreadsheet of claims data and pricing		
3		calculations in order to respond to specific questions from U.S.		
4		Department of Labor as part of investigation". The description is insufficient to support a claim of attorney client privilege as it does not		
		appear to involve the giving or receiving of legal advice. Further, as it		
5		involves claims data and pricing calculations as this court has previously		
6		stated that communications that relate to out-of-network reimbursement methodology involve plan administration and therefore fall within the		
7		fiduciary exception (dkt. 162, p. 30). Also, claims of privilege for attachments are held to the same standard as other claims of privilege		
8		(dkt. 201 p. 13) and the court has already found similar descriptions		
9		regarding email chains and attachments in its prior order (e.g., dkt. 201 p.		
		13).		
10		Privilege(s) asserted: attorney client & common interest		
11		Explanation of selection: For the common interest doctrine to apply there		
12		must be a common <i>legal</i> interest and the communication must be in		
13	PRIV-000042	further of that interest. <i>See, e.g., Nidec Corp. v. Victor Co. of Japan</i> , 249 F.R.D. 575, 579 (N.D. Cal. 2007). The description is insufficient to find		
14	FKIV-000042	common interest. The description also refers to 'expert's opinions' that		
		appear unlikely to be privileged under the two privileges asserted as the		
15		description specifically refers to "expert's opinions" that are not generally protected by attorney client or common interest privileges.		
16				
17		Privilege(s) asserted: attorney client & work product		
18		Explanation of selection: The description is insufficient as to both		
19		attorney-client and work product assertions of privilege to justify the complete withholding of the document instead of redacting privileged		
		communications. As at least some of the material in the document relates		
20		to the Department of Labor and since, as stated in the Court's prior order,		
21	PRIV-000046,	"there is no privilege that offers broad protection from disclosure for communications related to a government investigation" (dkt. 201, p. 11).		
22	PRIV-000344, PRIV-000577,	The description is also insufficient as to the "primary purpose"		
23	PRIV-000578,	requirement as a dual purpose communication is only protected by the attorney-client privilege when the primary purpose of the communication		
	PRIV-000582, PRIV-000590	is to give or receive legal advice. (dkt. 162, p. 19 citing to <i>In re Grand</i>		
24	FKIV-000390	Jury, 23 F.4th 1088, 1091 (9th Cir. 2021). Further, the identified author, Marjorie Wilde, in in-house counsel and assertions of attorney-client		
25		privilege between a corporate client and in-house counsel require a clear		
26		showing that the advice was given in a professional, legal capacity (dkt.		
27		162, p. 20 citing to <i>United States v. Chevron Corp.</i> , No. C-94-1885 SBA, 1996 WL 264769, at *4 (N.D. Cal. May 30, 1996), amended, No. C. 94-		
28		1885 SBA, 1996 WL 444597 (N.D. Cal. May 30, 1996). The description		
20		also is insufficient to overcome the fiduciary exception as this court has		

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1		previously stated that communications that relate to out-of-network reimbursement methodology involve plan administration and therefore		
2		fall within the fiduciary exception (dkt. 162, p. 30). Further, work		
3		product applies to material that was created for specific litigation that is imminent or pending (dkt. 201, p. 10) and that does not appear to apply		
4		to this claim.		
5		Privilege(s) asserted: attorney client, common interest, & work product		
6		Explanation of selection: The description is insufficient as to both		
7		attorney-client and work product assertions of privilege to justify the complete withholding of the document instead of redacting privileged		
8		communications. As at least some of the material in the document relates to pricing methodology or may relate to pricing methodology, the		
9	DD 117 000040	fiduciary exception may apply as the Court has already held that		
10	PRIV-000049, PRIV-000501,	communications that relate to out-of-network reimbursement methodology involve plan administration and therefore fall within the		
11	PRIV-000506, PRIV-000509,	fiduciary exception (dkt. 162, p. 30). There is also insufficient information as to the common interest privilege being asserted.		
12	PRIV-000516			
13		The description lacks the detail required to support an assertion of attorney client privilege as clearly set forth by this Court including, "(c)		
14		all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known		
15		to have been furnished the document or informed of its substance, and (e)		
16		the date the document was generated, prepared, or dated." <i>In re Grand Jury Investigation</i> , 974 F.2d 1068, 1071 (9th Cir. 1992)" (dkt. 201, p. 3).		
17		Privilege(s) asserted: attorney client		
18		Explanation of selection: The description is insufficient as to attorney-		
19		client privilege. As the document relates to pricing methodology, the fiduciary exception may apply. The Court has already held that		
20	 PRIV-000173,	communications that relate to out-of-network reimbursement		
21	PRIV-000179,	methodology involve plan administration and therefore fall within the fiduciary exception (dkt. 162, p. 30). There is also insufficient		
22	PRIV-000183, PRIV-000357,	information to determine whether the primary purpose of the document is the giving or seeking of legal advice. Dual purpose communications are		
23	PRIV-000469, PRIV-000470,	only protected by the attorney-client privilege when the primary purpose		
24	PRIV-000533,	of the communication is to give or receive legal advice. (dkt. 162, p. 19 citing to <i>In re Grand Jury</i> , 23 F.4th 1088, 1091 (9th Cir. 2021). Also,		
25	PRIV-000535, PRIV-000537	assertions of attorney-client privilege between a corporate client and inhouse counsel require a clear showing that the advice was given in a		
26		professional, legal capacity (dkt. 162, p. 20 citing to <i>United States v</i> .		
27		Chevron Corp., No. C-94-1885 SBA, 1996 WL 264769, at *4 (N.D. Cal. May 30, 1996), amended, No. C. 94-1885 SBA, 1996 WL 444597 (N.D. Cal. May 30, 1996).		
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1		Privilege(s) asserted: attorney client & work product
2		Explanation of selection: The description is insufficient as to both
3	PRIV-000180, PRIV-000355 PRIV-000239, PRIV-000250, PRIV-000288, PRIV-000530	attorney-client and work product assertions of privilege. The description, "concerning legal matters involving United" is insufficient and falls far
4	'	short of what the Court requires of a privilege log. As stated in this
5		Court's prior order, ""[t]his kind of boilerplate assertion of privilege falls far short of what is required to claim attorney-client privilege" (dkt. 201,
6		p. 12). Likewise, Plaintiffs cannot determine based upon the description whether the fiduciary exception or dual-purpose principle applies.
7		
8		Privilege(s) asserted: attorney client & common interest
9		Explanation of selection: The description lacks the detail required to support an assertion of attorney client privilege as clearly set forth by this
10	PRIV-000239,	Court including, "(c) all persons or entities shown on the document
11		to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e)
12	'	the date the document was generated, prepared, or dated." <i>In re Grand Jury Investigation</i> , 974 F.2d 1068, 1071 (9th Cir. 1992)" (dkt. 201, p. 3).
13	,	The description is also insufficient as to the common interest assertion of
14		privilege. For the common interest doctrine to apply there must be a common <i>legal</i> interest and the communication must be in further of that
15		interest. See, e.g., Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 579 (N.D. Cal. 2007). The description is insufficient to find common
16		interest.
17		Privilege(s) asserted: attorney client & common interest
18		Explanation of selection: The description is insufficient as to both the
19		attorney client and common interest privileges being asserted. The assertion, "concerning a draft response to a state agency" lacks the detail
20		required by the Court. As stated in the Court's prior order, "there is no privilege that offers broad protection from disclosure for
21		communications related to a government investigation" (dkt. 201, p. 11).
22	 PRIV-000287	It is also unclear whether the fiduciary exception applies or whether the primary purpose of the document was the giving or receiving of legal
23	1 K1 v -00020 /	advice. As to the common interest privilege, for the common interest doctrine to apply there must be a common <i>legal</i> interest and the
24		communication must be in further of that interest. See, e.g., Nidec Corp.
25		v. Victor Co. of Japan, 249 F.R.D. 575, 579 (N.D. Cal. 2007). The description is insufficient to find common interest. The description also
26		refers to 'expert's opinions' that appear unlikely to be privileged under the two privileges asserted as the description specifically refers to
27		"expert's opinions" that are not generally protected by attorney client or common interest privileges.
28		Tommon moreov pri megan.

1		Privilege(s) asserted: attorney client	
2		Explanation of selection: The description lacks the detail required to	
3	PRIV-000298 PRIV-000311, PRIV-000363, PRIV-000607, PRIV-000610	support an assertion of attorney client privilege as clearly set forth by this Court including, "(c) all persons or entities shown on the document	
4		to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e)	
5	PRIV-000298	the date the document was generated, prepared, or dated." In re Grand	
6		Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992)" (dkt. 201, p. 3). Further, the description, "potential existence of legal obligations" is	
7		insufficient to show that the primary purpose of the document was the giving or receiving of legal advice and that the entire document should	
8		be withheld.	
9		Privilege(s) asserted: attorney client	
10		Explanation of selection: The description lacks the detail required to	
11	PRIV-000311,	support an assertion of attorney client privilege as clearly set forth by this Court including, "(c) all persons or entities shown on the document	
12	'	to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e)	
13	PRIV-000607,	the date the document was generated, prepared, or dated." <i>In re Grand Jury Investigation</i> , 974 F.2d 1068, 1071 (9th Cir. 1992)" (dkt. 201, p. 3).	
14		Further, the description is insufficient to determine whether MultiPlan	
15		was acting in the capacity of a settlor or a fiduciary as to the contents of the document.	
16 17		Privilege(s) asserted: attorney client & work product	
18		Explanation of selection: The description is insufficient as to both	
19		attorney-client and work product assertions of privilege to justify the complete withholding of the document instead of redacting privileged	
20		communications. As at least some of the material in the document relates	
21		to the Department of Labor and since, as stated in the Court's prior order, "there is no privilege that offers broad protection from disclosure for	
22	PRIV-000317	communications related to a government investigation" (dkt. 201, p. 11). Further, as the description mentions "Viant services," as this court has	
23	PRIV-000337 PRIV-000340	previously stated that communications that relate to out-of-network reimbursement methodology involve plan administration and therefore	
24		fall within the fiduciary exception (dkt. 162, p. 30). The description is also insufficient as to the "primary purpose" requirement as a dual	
25		purpose communication is only protected by the attorney-client privilege	
26		when the primary purpose of the communication is to give or receive legal advice. (dkt. 162, p. 19 citing to <i>In re Grand Jury</i> , 23 F.4th 1088,	
27		1091 (9th Cir. 2021).	
28		Additionally, Marjorie Wilde, is in-house counsel and assertions of attorney-client privilege between a corporate client and in-house counsel	

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1 2		require a clear showing that the advice was given in a professional, legal capacity (dkt. 162, p. 20 citing to <i>United States v. Chevron Corp.</i> , No. C-94-1885 SBA, 1996 WL 264769, at *4 (N.D. Cal. May 30, 1996),		
3		amended, No. C. 94-1885 SBA, 1996 WL 444597 (N.D. Cal. May 30, 1996). The description also is insufficient to overcome the fiduciary		
4		exception as this court has previously stated that communications that relate to out-of-network reimbursement methodology involve plan		
5		administration and therefore fall within the fiduciary exception (dkt. 162, p. 30). Further, work product applies to material that was created for		
6 7		specific litigation that is imminent or pending (dkt. 201, p. 10) and that does not appear to apply to this claim.		
8		Privilege(s) asserted: attorney client & common interest		
9		Explanation of selection: The description is insufficient as to attorney-		
10		client privilege and common interest privilege. As the document is "concerning pricing," the fiduciary exception may apply. The Court has		
11		already held that communications that relate to out-of-network		
12		reimbursement methodology involve plan administration and therefore fall within the fiduciary exception (dkt. 162, p. 30). There is also		
13		insufficient information to determine whether the primary purpose of the document is the giving or seeking of legal advice. Dual purpose		
14		communications are only protected by the attorney-client privilege when the primary purpose of the communication is to give or receive legal		
15	PRIV-000347	advice. (dkt. 162, p. 19 citing to <i>In re Grand Jury</i> , 23 F.4th 1088, 1091		
16		(9th Cir. 2021). Also, assertions of attorney-client privilege between a corporate client and in-house counsel require a clear showing that the advice was given in a professional, legal capacity (dkt. 162, p. 20 citing		
17		to United States v. Chevron Corp., No. C-94-1885 SBA, 1996 WL		
18		264769, at *4 (N.D. Cal. May 30, 1996), amended, No. C. 94-1885 SBA, 1996 WL 444597 (N.D. Cal. May 30, 1996). The description is		
19		insufficient to find common interest. The description also refers to 'expert's opinions' that appear unlikely to be privileged under the two		
20		privileges asserted as the description specifically refers to "expert's opinions" that are not generally protected by attorney client or common		
21		interest privileges.		
22		Privilege(s) asserted: attorney client		
23		Explanation of selection: The description is insufficient as to attorney-		
24		client privilege. The description does not clearly meet "primary purpose"		
25	PRIV-000525	requirement and a dual-purpose communication is only protected by the attorney-client privilege when the primary purpose of the communication		
26		is to give or receive legal advice. (dkt. 162, p. 19 citing to <i>In re Grand Jury</i> , 23 F.4th 1088, 1091 (9th Cir. 2021). Further, the identified author,		
27		Marjorie Wilde, in in-house counsel and assertions of attorney-client privilege between a corporate client and in-house counsel require a clear		
28		showing that the advice was given in a professional, legal capacity (dkt.		

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1 2 3 4		162, p. 20 citing to <i>United States v. Chevron Corp.</i> , No. C-94-1885 SBA, 1996 WL 264769, at *4 (N.D. Cal. May 30, 1996), amended, No. C. 94-1885 SBA, 1996 WL 444597 (N.D. Cal. May 30, 1996). The description also is insufficient to overcome the fiduciary exception as the description suggests the document may involve plan administration and therefore fall within the fiduciary exception (dkt. 162, p. 30).		
5		Privilege(s) asserted: attorney client		
6		Explanation of selection: The description is insufficient as to attorney-		
7		client assertions of privilege to justify the complete withholding of the document instead of redacting privileged communications. The		
8		description suggests that the document may relate to out-of-network		
9		reimbursement methodology and/or pricing methodology that the Court has already stated may involve plan administration and therefore fall		
10		within the fiduciary exception (dkt. 162, p. 30). The description is also insufficient as to the "primary purpose" requirement as a dual-purpose		
11		communication is only protected by the attorney-client privilege when the primary purpose of the communication is to give or receive legal		
12	PRIV-000550, PRIV-000559, PRIV-000563, PRIV-000564	advice. (dkt. 162, p. 19 citing to <i>In re Grand Jury</i> , 23 F.4th 1088, 1091 (9th Cir. 2021).		
13		Additionally, Marjorie Wilde, is in-house counsel and assertions of		
14 15		attorney-client privilege between a corporate client and in-house counsel require a clear showing that the advice was given in a professional, legal		
16 17		capacity (dkt. 162, p. 20 citing to <i>United States v. Chevron Corp.</i> , No. C-94-1885 SBA, 1996 WL 264769, at *4 (N.D. Cal. May 30, 1996), amended, No. C. 94-1885 SBA, 1996 WL 444597 (N.D. Cal. May 30,		
18	PRIV-000559, PRIV-000563,	1996). The description also is insufficient to overcome the fiduciary exception as this court has previously stated that communications that		
19		relate to out-of-network reimbursement methodology involve plan administration and therefore fall within the fiduciary exception (dkt. 162,		
20		p. 30). Further, work product applies to material that was created for specific litigation that is imminent or pending (dkt. 201, p. 10) and that		
21		does not appear to apply to this claim.		
22		<u> </u>		
23	Dated: October 20	, 2022 ARNALL GOLDEN GREGORY LLP		
24	Daicu. October 28	, 2022 ARNALL GOLDEN GREGORY LLP		
25		/s/ Aaron R. Modiano		
26		By: MATTHEW M. LAVIN AARON R. MODIANO		
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/ (A) !	i			

PLAINTIFFS IDENTIFICATION OF DOCUMENTS FOR POTENTIAL IN CAMERA REVIEW

Case 4:20-cv-02254-YGR	Document 240	Filed 10/28/22	Page	9 of 9
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CERTIFICATE OF SERVICE I, Aaron R. Modiano, hereby certify that on October 28, 2022, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California using the CM/ECF system, which shall send electronic notification to all counsel of record. /s/ Aaron R. Modiano Aaron R. Modiano